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No. 03-1088

In the Supreme Court of the United States

SCOTT RISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was validly convicted of conspiracy to commit mail and wire fraud based on his participation in a kickback scheme.

2. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services," is unconstitutionally vague.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 345 F.3d 952.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2003. A petition for rehearing was denied on October 28, 2003 (Pet. App. 68). The petition for a writ of certiorari was filed on January 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. 371. He was

sentenced to two months of imprisonment, to be followed by 12 months of supervised release, and was fined $10,000. Petitioner and his co-defendant were also found jointly and severally liable for $77,062.87 in restitution. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner is a chiropractor who owned Milwaukee Spinal Injury Center (MSIC), a chiropractic clinic in Milwaukee, Wisconsin. His co-defendant Charles Hausmann is a personal injury lawyer who often negotiated settlements with insurance companies for clients of his law firm, Hausmann-McNally, S.C. Under Hausmann-McNally's standard retainer agreement, the client agreed to pay the law firm one-third of whatever total sum was collected. The agreement also authorized the law firm to pay medical and other bills incurred as a result of an accident. The funds used to pay those bills would be sent directly to the doctors and hospitals who had performed the relevant medical services and would be deducted from the client's portion of the recovery. Hausmann-McNally often referred clients to health care providers for treatment of their injuries. When necessary to achieve a fair settlement for the client, the law firm would negotiate a reduction in a medical bill with the health care provider. Pet. App. 2-3; Gov't C.A. Br. 9-10.

The instant prosecution was based on a referral arrangement under which Hausmann directed clients to petitioner's clinic. After Hausmann-McNally had paid the clients' medical bills out of the settlement proceeds, petitioner made payments equal to 20% of the bills to various third parties at Hausmann's direction. Such payments were made by MSIC to individuals who had provided personal services to Hausmann or his relatives, a marketing firm hired by Hausmann, business

entities in which Hausmann held an interest, and charities that Hausmann supported. Between October 1999 and June 2001, MSIC was paid $371,862.39 for medical bills for Hausmann's clients, and MSIC paid $77,062.87 to third parties at Hausmann's direction. The referral arrangement was not disclosed to Hausmann's clients or to his law partners. Pet. App. 2-3; Gov't C.A. Br. 7-8, 11-17.

The settlement payments for MSIC's medical bills were handled differently from payments to other medical providers, who were typically issued checks after the settlement proceeds were received. Hausmann directed that the checks to MSIC be segregated, and he met with petitioner each month to deliver the checks. At those meetings, petitioner would then write checks, on MSIC's behalf, payable to third parties that Hausmann named. Petitioner admitted to one of his employees that he paid Hausmann 20% kickbacks on the medical bills by writing checks to third parties at Hausmann's direction. When he was subsequently confronted by federal agents, petitioner denied paying kickbacks to Hausmann. Gov't C.A. Br. 12-13, 18-19.

2. Count One of the indictment (Pet. App. 69-75) charged that petitioner and Hausmann had conspired to commit mail and wire fraud offenses. The federal mail and wire fraud statutes prohibit the use of mail or wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. The term "scheme or artifice to defraud" is defined to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Before trial, petitioner and Hausmann moved to dismiss the indictment on the grounds that it failed to

charge an offense and that the mail and wire fraud statutes were unconstitutionally vague as applied in this case. Agreeing with the magistrate judge's recommendation, see Pet. App. 33-67, the district court denied the motion. *Id.* at 16-18. Shortly thereafter, Hausmann entered a conditional guilty plea to Count One of the indictment pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving his right to appeal the denial of the motion. Pet. App. 3 & n.2.

3. In its jury instructions at petitioner's trial, the district court defined the term "scheme to defraud" as follows:

> A scheme to defraud is a plan or course of action formed with an intent to accomplish some purpose. A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or to cause the loss of money or property of another or to deprive a client of his or her right to the honest services of his or her attorney by means of materially false and fraudulent pretenses, representation[s] or promises.

06/07/02 Tr. 569. The court emphasized that it was "essential that one or more of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme be proven beyond a reasonable doubt."[1] *Id.* at 570. The court further explained (*ibid.*):

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[1] The indictment alleged that the kickback arrangement constituted materially false pretenses, representations, and promises towards Hausmann's clients with respect to: (a) "the relationship between Hausmann-McNally, S.C. and MSIC"; (b) "the compensation obtained by the law firm and lawyers as a result of the case"; and (c) "the amount of medical payments actually kept by MSIC." Pet. App. 71-72.

> A pretense, representation, promise or act is material if it has a natural tendency to influence or is capable of influencing the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction [on] particular terms. However, it is not necessary that the person was actually influenced by the pretenses, representation, promise or act.

With respect to the existence of a scheme to deprive Hausmann's clients of their right to the law firm's honest services, the district court instructed the jury:

> To find that there existed a scheme to deprive one or more clients of the Hausmann McNally law firm of his or her right to the honest services of that firm you must find beyond a reasonable doubt, first, that a fiduciary relationship existed between one or more of the clients of the Hausmann McNally law firm. Second, that [petitioner] and Charles Hausmann knowingly engaged in a scheme to deprive one or more clients of the Hausmann McNally law firm of the right to honest services of the Hausmann McNally law firm as charged in Count 1. And, third, that through such scheme Charles Hausmann misused his fiduciary relationship with one or more clients of the Hausmann McNally law firm for personal gain.

06/07/02 Tr. 570-571. The district court also instructed the jury that it was required to find that petitioner "became a member of the conspiracy with an intention to further the conspiracy and in doing so acted with intent to defraud." *Id.* at 571. The court further explained (*id.* at 573):

> To act with intent to defraud means that the acts charged were done knowingly with the intent to deceive or cheat the clients of the Hausmann McNally law firm to cause a gain of money by [petitioner] or Charles Hausmann, the loss of money by one or more clients of the Hausmann McNally law firm or to deprive one or more clients of the Hausmann McNally law firm of the right to the honest services of Charles Hausmann or the Hausmann McNally law firm by means of materially false and fraudulent pretenses, representations, or promises.

The district court declined to instruct the jury that, in order to find petitioner guilty, it was also required to find that petitioner reasonably contemplated harm to Hausmann's clients and that the scheme was intended to cause a loss to Hausmann's clients as well as a gain to Hausmann. Pet. App. 12-13; Gov't C.A. Br. 47. The jury found petitioner guilty.

4. The court of appeals affirmed the convictions of petitioner and Hausmann. Pet. App. 1-15. The court expressed doubt that the "'intangible-rights theory' provisions of the mail and wire fraud statutes" could validly be applied to cases involving "breach of fiduciary duty with nothing more." *Id.* at 5-6. The court nevertheless rejected petitioner's challenges to the sufficiency of the indictment and the sufficiency of the evidence. *Id.* at 4-10. Relying on prior Seventh Circuit precedents, the court explained that, "under the intangible-rights theory * * *, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his

fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed." *Id.* at 6.

The court of appeals held that the indictment adequately alleged, and the evidence at trial was sufficient to show, that Hausmann had breached a fiduciary duty to his clients. Pet. App. 6-7. The court also concluded that the government had alleged and proved that "Hausmann gained over $70,000 in kickback payments made to third parties for his personal benefit or entities in which he had some interest * * * and that such concealed payments deprived clients of the intangible right of honest services." *Id.* at 7. The court rejected petitioner's argument that the referral arrangement did not harm Hausmann's clients. *Id.* at 8. The court explained that "Hausmann deprived his clients of their right to know the truth about his compensation," and that "every dollar of [petitioner's] effective twenty percent fee discount went to Hausmann's benefit" when "that discount should have inured to the benefit of his clients." *Ibid.* The court concluded that "Hausmann illegally profited at the expense of his clients, who were entitled to his honest services as well as their contractually bargained-for portion of [petitioner's] discount." *Ibid.* In addition, the court held that petitioner, as "the knowing payer of an illegal kickback," had "acted in furtherance of the conspiracy to defraud the clients" and was therefore criminally liable to the same extent as Hausmann. *Id.* at 9.

The court of appeals rejected petitioner's claim that the mail and wire fraud statutes were unconstitutionally vague as applied in this case. Pet. App. 10-11. The court explained that prior Seventh Circuit decisions had "placed [petitioner and Hausmann] on notice that criminal liability under the mail and wire fraud statutes—particularly under an intangible-rights

theory—attaches to the misuse of one's fiduciary position for personal gain." *Id.* at 11. The court also observed that "the existence of Hausmann's fiduciary duty owed to his clients distinguishes this case from one where the government arbitrarily and impermissibly relies upon the mail and wire fraud statutes to enforce merely the terms of a private contract." *Ibid.*

Finally, the court of appeals held that the district court had correctly declined to instruct the jury that it was required to find that petitioner reasonably contemplated harm to Hausmann's clients or that the scheme was intended as a loss to Hausmann's clients as well as a gain to Hausmann. Pet. App. 12-14. The court found "no requirement under the law * * * that a co-conspirator to a wire and mail fraud scheme contemplate actual or foreseeable harm to the victim." *Id.* at 13. The court also found that, "though the law does not require the court to instruct a jury that the scheme is intended to cause a loss to the victims *as well as* a gain to the offender, the loss element [was] implicit in the district court's references both to a deprivation of one or more clients' right to honest services—a type of loss in and of itself—and to Hausmann's gain." *Ibid.* "[O]nce [petitioner] opted to discount his fees for chiropractic services," the court explained, "Hausmann's clients shared [petitioner's] economic loss—a corollary to their entitlement to a portion of Hausmann's gain." *Id.* at 13-14.

ARGUMENT

1. Petitioner contends (Pet. 6-18) that his conviction for conspiracy to commit mail fraud and wire fraud is invalid because the government did not prove reasonably foreseeable or contemplated harm to the victims of the scheme to defraud. He asserts that this Court's

review is warranted to resolve a conflict among the courts of appeals over the scope of honest services fraud under 18 U.S.C. 1346. Petitioner overstates the significance of the differences among the courts of appeals on the scope of Section 1346, however, and he fails to identify any decision of another court of appeals that has reached a conflicting result on comparable facts. This Court's review is therefore not warranted.

a. The mail fraud statute, 18 U.S.C. 1341, and the wire fraud statute, 18 U.S.C. 1343, make it unlawful to use mail and wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[2] Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the intangible rights covered by the statute included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In *McNally*, this Court rejected the "intangible rights" theory of mail fraud prosecution, holding that the mail fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in

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[2] Because the mail and wire fraud statutes share the same operative language, the same analysis applies to both sets of offenses. See *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

McNally that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360. Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

b. Both before and after *McNally*, courts of appeals have expressed concern that honest services fraud in the private sector could encompass mere breaches of loyalty or fiduciary duty. See, *e.g.*, *United States* v. *Vinyard*, 266 F.3d 320, 326-327 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *United States* v. *deVegter*, 198 F.3d 1324, 1328-1329 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000); *United States* v. *Frost*, 125 F.3d 346, 368 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); *Lemire*, 720 F.2d at 1336-1337. Seeking to avoid a perceived potentially overbroad construction of Section 1346, the First, Fourth, Sixth, Eleventh, and District of Columbia Circuits have concluded that, when honest services mail fraud is charged in the context of private corruption, the government must show, *inter alia*, that the deception exposed the victim to reasonably foreseeable potential economic harm. See *United States* v. *Martin*, 228 F.3d 1, 17-18 (1st Cir. 2000); *Vinyard*, 266 F.3d at 327-329; *Frost*, 125 F.3d at 368-369; *deVegter*, 198 F.3d at 1329-1330; *United States* v. *Sun-Diamond Growers*, 138 F.3d 961, 973-974 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999). The "reasonably foreseeable harm" test adopted by those circuits does not require proof of an actual economic loss or an intent to cause economic harm to the victim.

See *Vinyard*, 266 F.3d at 329; *Sun-Diamond Growers*, 138 F.3d at 974; *Frost*, 125 F.3d at 369. Rather, "the prosecution must prove only that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk." *Frost*, 125 F.3d at 369; see also *Vinyard*, 266 F.3d at 329; *deVegter*, 198 F.3d at 1330.

As petitioner recognizes (Pet. 9-10, 13-14), other courts of appeals have used a different formulation to limit the scope of private sector honest services fraud. Instead of requiring proof that a defendant reasonably should have foreseen that his deception would create an identifiable risk of harm to the victim, the Second, Fifth, Eighth, and Tenth Circuits require proof that the defendant possessed fraudulent intent and made a material misrepresentation. See *United States* v. *Rybicki*, 354 F.3d 124, 145-146 (2d Cir. 2003) (in banc), petition for cert. pending, No. 03-1375 (filed Mar. 29, 2004); *United States* v. *Gray*, 96 F.3d 769, 774-775 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Jain*, 93 F.3d 436, 441 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997); *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). Under the "materiality" test, "the misrepresentation or omission at issue for an 'honest services' fraud conviction must be 'material,' such that the misinformation or omission would naturally tend to lead or is capable of leading a reasonable [victim] to change its conduct." *Rybicki*, 354 F.3d at 145; see *Cochran*, 109 F.3d at 667-668 n.3; *Gray*, 96 F.3d at 775.

The jury instructions given by the district court in this case are consistent with prior decisions that apply the "materiality" test. The court defined the term "scheme to defraud" to require deception "by means of

materially false and fraudulent pretenses, representation[s] or promises." 06/07/02 Tr. 569. The district court also instructed the jury that it was required to find that petitioner "acted with intent to defraud." *Id.* at 571. Thus, although the jury was not explicitly required to find that the defendants' conduct created a reasonably foreseeable risk of harm to the clients referred by Hausmann to petitioner, the instructions did require the jury to find both that (i) the conspirators' concealment of the kickback scheme was material to the clients' decisions to retain Hausmann as their attorney and to obtain medical services from petitioner, and (ii) petitioner acted with fraudulent intent.

c. No meaningful substantive difference exists between the "materiality" test reflected in the district court's jury instructions and the "reasonably foreseeable harm" test utilized by some courts of appeals. A representation "is material if it has a natural tendency to influence or is capable of influencing the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction [on] particular terms." 06/07/02 Tr. 570. If a particular misrepresentation would have a "natural tendency to influence" a reasonable person's decision, then it is, *ipso facto*, "reasonably foreseeable" that the misrepresentation will "harm" that person by causing him to engage in conduct in which he would not engage if he were aware of the relevant facts. See, *e.g.*, *Vinyard*, 266 F.3d at 328 n.7 ("For the most part, application of the materiality approach will be identical to the reasonably foreseeable harm test, because an employer would almost certainly alter his business practices if disclosure of a fraud scheme revealed either foregone business opportunities or an economic threat."); *Frost*, 125 F.3d at 368 (observing that "the difference between the two standards

may be slight"); *Lemire*, 720 F.2d at 1337 ("Although [the reasonably foreseeable harm] formulation may differ in some respects from that of other courts, we believe it only makes more explicit what they meant by a 'material non-disclosure or misrepresentation.'"); *id.* at 1338 ("[T]he notion of materiality of non-disclosure or misrepresentation in the wire fraud context must logically focus on the reasonable foreseeability by the employee of potential economic harm to his employer.").[3]

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[3] Although petitioner suggests (Pet. 14-15) that the courts of appeals disagree on other issues concerning the scope of honest services fraud under Section 1346, this case provides no opportunity to resolve those questions. For example, petitioner notes that the Fifth Circuit appears to require proof that the defendant violated a duty owed under state law. *United States* v. *Brumley*, 116 F.3d 728, 734 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997). The defendant in *Brumley*, however, was a state adjudicative officer who accepted payments from lawyers who practiced before him. Because the defendant in *Brumley* was a state employee, the court had no occasion to consider the application of Section 1346 to private sector defendants. In any event, the court of appeals in this case did not address the question whether the government is required to prove a state law source of the right of honest services in either the private or public sector, and the law in the Seventh Circuit is unsettled. See *United States* v. *Martin*, 195 F.3d 961, 967 (7th Cir. 1999) ("[W]e shall adhere to our anti-*Brumley* position for now, but without prejudice to reexamining it without preconceptions should a full argument against it be mounted in a future case."), cert. denied, 530 U.S. 1263 (2000).

Petitioner also asserts that two other circuits have rejected the requirement adopted by the Seventh Circuit in *United States* v. *Bloom*, 149 F.3d 649, 655 (1998), that the government must show that a defendant's misuse of his fiduciary position resulted in personal gain in order to establish a scheme to defraud. In *United States* v. *Welch*, 327 F.3d 1081, 1106-1107 (10th Cir. 2003), however, the court held only that an indictment must allege an intent to deprive the victim of the right of honest services, not that it

d. Contrary to petitioner's contention (Pet. 16-18), the evidence at trial was sufficient to show that petitioner and Hausmann conspired to deprive Hausmann's clients of their intangible right to Hausmann's honest services. As an attorney, Hausmann owed a fiduciary duty to his clients. See Pet. App. 45 (magistrate judge notes that "[petitioner and Hausmann] agree with the general proposition that there exists a fiduciary relationship between a lawyer and a client"). Hausmann clearly breached that fiduciary duty by failing to disclose his kickback arrangement with petitioner. See, *e.g.*, *United States* v. *Dial*, 757 F.2d 163, 168 (7th Cir.) ("Even more clearly is it fraud to fail to 'level' with one to whom one owes fiduciary duties. The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal's alter ego rather than to assume the standard arm's length stance of traders in a market."), cert. denied, 474 U.S. 838 (1985).

Moreover, Hausmann misused his fiduciary position for personal gain, since he failed to disclose to his

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must allege an intent to achieve personal gain. In *United States* v. *Panarella*, 277 F.3d 678, 694 (3d Cir.), cert. denied, 537 U.S. 819 (2002), the court stated that, "[r]ather than limiting honest services fraud to misuse of office for personal gain, we hold that a public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud." The court in *Panarella* went on to note, however, that its holding was "limited to public officials, and does not reach private officials' breach of a fiduciary duty to disclose." *Id.* at 699; see *id.* at 699 n.9 ("Although we hold that the existence of a violation of state law, coupled with the other facts discussed above, is *sufficient* to establish honest services wire fraud in this case, we need not decide whether a violation of state law is *necessary* for non-disclosure of a conflict of interest to amount to honest services fraud.").

clients that he was receiving—in addition to the one-third portion of the insurance settlement proceeds to which his clients had agreed—kickbacks amounting to 20% of the medical bills for services provided by petitioner to the clients. Cf. *McNally*, 483 U.S. at 355 (noting that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud" under the intangible rights theory). Furthermore, the concealment of the kickback scheme was material to the clients' decisions about both legal representation and medical treatment. Because the medical bills were deducted from the client's two-thirds portion of the insurance settlement proceeds, the kickback scheme directly reduced the client's share of the settlement proceeds while enriching Hausmann. In light of that direct economic effect on the client's interests, disclosure of the kickback scheme would have naturally tended to lead a reasonable client to object to such an arrangement. Thus, the conspiratorial agreement in this case involved far more than a mere breach of fiduciary duty or nondisclosure of a conflict of interest.

Application of the "reasonably foreseeable harm" test would not produce a different outcome here. As the court of appeals recognized, the kickbacks paid by petitioner amounted to an "effective twenty percent fee discount" on the medical bills for clients referred by Hausmann. Pet. App. 8. Because the medical bills were deducted from the client's two-thirds portion of the insurance settlement proceeds, "that discount should have inured to the benefit of [Hausmann's] clients." *Ibid.* The kickback scheme, however, allowed Hausmann to obtain a share of the insurance settlement proceeds in each case in excess of the one-third portion to which the clients had agreed. At the same time, the kickback scheme necessarily reduced the client's share

of the recovery on a direct dollar-for-dollar basis. It was therefore reasonably foreseeable that the kickback arrangement would result in economic harm to Hausmann's clients.

Petitioner does not identify any instance in which another court of appeals has reached a contrary result in a case involving comparable facts. Petitioner asserts (Pet. 8) that *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), is "strikingly similar," but that case is distinguishable. In *Jain*, the Eighth Circuit reversed the mail fraud conviction of a psychologist who was paid kickbacks by a hospital for patient referrals. The court concluded that there was "no evidence that any patient suffered tangible harm" because the psychologist provided quality services, each patient required hospitalization, the hospital provided proper care, and no patient was financially harmed by the kickback arrangement. *Id.* at 441. In contrast, the kickbacks paid by petitioner to Hausmann in this case harmed Hausmann's clients, because the inclusion of the 20% kickback in the medical bills effectively reduced the client's share of the recovery. Accordingly, there is no conflict between *Jain* and the court of appeals' decision in this case.[4]

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[4] Petitioner also asserts (Pet. 10) that the court of appeals' decision in this case is inconsistent with *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983). In *Feldman*, the Seventh Circuit stated that, "[w]hen an employee breaches a fiduciary duty to disclose information to his employer, that breach of duty can support a mail or wire fraud conviction only if the nondisclosed information was material to the conduct of the employer's business and the nondisclosure could or does result in harm to the employer." *Id.* at 763. *Feldman*'s requirement of potential harm to the employer, however, adds little to the requirement of a material nondisclosure, "[s]ince an employer presumably

2. Petitioner contends (Pet. 18-24) that 18 U.S.C. 1346 is unconstitutionally vague as applied to his conduct. That claim lacks merit and does not warrant this Court's review.

The Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); see *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (opinion of Stevens, J.). Under this Court's precedents, petitioner may not attack Section 1346 as unconstitutionally vague simply by showing that hypothetical situations may exist in which the statute would be ambiguous. Rather, petitioner can prevail only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must

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would 'change its business conduct' only if, upon disclosure of [a conflict of interest] and any other relevant information, it saw new opportunities for profit or savings, or dangers of economic harm." *Lemire*, 720 F.2d at 1338. *Feldman* recognized, moreover, that mail fraud convictions had been upheld "where a defendant employee was receiving kickbacks which might have caused the employer to pay a higher price than necessary for certain items." 711 F.2d at 763. In any event, any inconsistency between the Seventh Circuit's decisions in this case and in *Feldman* should be resolved by the court of appeals rather than by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

The application of Section 1346 to the deceptive breach of Hausmann's fiduciary duties is fully consistent with the classical definition of fraud, which includes the deliberate concealment of material information in a setting of fiduciary obligation.[5] See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 653-654 (1997). It is also fully consistent with pre-*McNally* decisions applying the "honest services" theory, which reflect the understanding of the mail and wire fraud statutes that Congress sought to restore when it enacted Section 1346. See, *e.g.*, *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.) (noting that mail fraud convictions had been upheld "where a defendant employee was re-

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[5] For that reason, there is no substance to petitioner's suggestion (Pet. 15, 23) that Hausmann's conduct involved merely a violation of a state ethical rule. Nor is there any force to petitioner's suggestion (Pet. 15-16) that a professional's failure to disclose any ulterior motive—such as high school friendship or family connections—for referring a client to another professional necessarily amounts to honest services fraud under the the court of appeals' decision in this case. Under the court's decision, a failure to disclose in breach of a fiduciary duty amounts to honest services fraud only when it results in personal gain. See Pet. App. 6 ("[A] valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed."). Moreover, a failure to disclose rises to the level of a breach of a fiduciary duty only when it involves the concealment of *material* information. Finally, to establish honest services fraud, the government must also prove that the defendant acted with fraudulent intent.

ceiving kickbacks which might have caused the employer to pay a higher price than necessary for certain items"), cert. denied, 464 U.S. 939 (1983). Indeed, prosecutions based on kickbacks to fiduciaries were regularly brought on the theory of honest services fraud before *McNally* was decided. See *McNally*, 483 U.S. at 363 (Stevens, J., dissenting) ("In the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information."). Against that legal backdrop, a "person of ordinary intelligence," *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976) (per curiam), would know that the kickback scheme fraudulently deprived Hausmann's clients of the honest services of their attorney. And because "the knowing payer of an illegal kickback is criminally liable for conspiracy to commit mail or wire fraud to the same extent as the recipient of such a payment," Pet. App. 9, the application of Section 1346 to petitioner's conduct is likewise consistent with the Due Process Clause.

The courts of appeals have uniformly rejected claims that Section 1346 is unconstitutionally vague. See, *e.g.*, *Rybicki*, 354 F.3d at 132; *Welch*, 327 F.3d at 1109 n.29; *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Paradies*, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997); *United States* v. *Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997); *United States* v. *Waymer*, 55 F.3d 564, 568-569 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

Petitioner notes (Pet. 21) that the Second Circuit in *United States* v. *Handakas*, 286 F.3d 92, 107, cert. denied, 537 U.S. 894 (2002), found Section 1346 unconstitutionally vague as applied to the facts of that case, which involved a bid contractor working for a state school authority who willfully breached a contractual requirement that he pay his employees the prevailing wage and who misrepresented the wages on a disclosure form that he was required to file with the State. 286 F.3d at 96-97. *Handakas* thus involved a breach of a contractual obligation rather than, as in this case, a deceptive breach of a fiduciary duty. See Pet. App. 11 (distinguishing *Handakas* on that basis). In any event, as petitioner recognizes (Pet. 22), the Second Circuit recently "overrule[d] the unnecessary constitutional ruling" in *Handakas*. *Rybicki*, 354 F.3d at 144. Review by this Court of petitioner's due process claim is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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